This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 7/01/03.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
ALBERT E. BRAJCZEWSKI,	)	CHARGE NO: **2000 CA 0742**
Complainant,	)	EEOC NO: **21 BA 00067**
	)	ALS NO: **11440**
and	)	
	)	
PHOENIX COLOR CORP.,	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter comes before me on the Complaint of Albert E. Brajczewski and Phoenix Color Corp. filed with the Illinois Human Rights Commission (Commission) on December 27, 2000. The Complaint alleges that Respondent was discriminated against because of his age in violation of The Illinois Human Rights Act, 775 ILCS 5/1-101 et. seq., (Act).

A public hearing was held on November 6, 2002. At the close of Complainant's case in chief on liability, Respondent moved for a directed finding arguing that the Complainant failed to establish a *prima facie* case of age discrimination. The Complainant was given an opportunity to orally respond to Respondent's motion. I then granted Respondent's motion and closed the public hearing, giving the parties an opportunity to submit closing briefs by January 24, 2003. Respondent submitted a Post-Hearing Brief, while Complainant failed to file one. This matter is now ready for decision.

Contentions of the Parties

Complainant filed this Complaint alleging he was discharged because of his age; 55. Complainant's Complaint contends that he had a good work record

and that employer's stated reason for discharging him was that he was too old and slow. Respondent contends that Complainant was terminated because of poor performance and because they were closing the facility due to financial difficulties.

At the close of Complainant's case in chief, Respondent moved for directed verdict, which was granted.

Findings of Fact

1. On October 21, 1999, Complainant filed a Charge of Discrimination against Respondent with the Illinois Department of Human Rights (Department).

2. On December 27, 2000, the Department filed a Complaint on behalf of the Complainant with the Illinois Human Rights Commission (Commission) alleging that Respondent had discriminated against him on the basis of his age in violation of the Act when it discharged him on September 15, 1999.

3. Complainant worked for Mid-City Lithographers, Inc. from December 19, 1988 until December 31, 1998, as a shipping and receiving clerk. As of January 1, 1999, Mid-City Lithographers was acquired by Respondent Phoenix Color Corporation. Complainant worked for Respondent up to the date of his termination on September 15, 1999.

4. Complainant's age at the time of the termination was 55.

5. Due to financial difficulties, the facility that Complainant worked in was being closed. Notice was sent to Complainant and the remaining workers in the facility. The facility was closed in December of 1999 and all employees were terminated.

6. In all, 90 employees were terminated in 1999, including Complainant. The employees of the entire shipping department where Complainant worked, which consisted of 9 men, were terminated in 1999.

7. Andrew Ward, the general manager for Respondent, made the decision to terminate Complainant.

8. Complainant's supervisor, Mr. James Turner informed Complainant of the

decision to terminate him on September 15, 1999.

9. Complainant did not introduce any evidence that Andrew Ward made any remarks regarding Complainant's age prior to his decision to terminate him, or that Mr. Ward based his decision on the age of Complainant.

10. Complainant failed to introduce any evidence that Respondent's facility did not cease to operate nor were other employees terminated as a result of the facility's closure.

Conclusions of Law

1. Complainant is an "aggrieved party" as defined by section 5/1-103(B) of the Act.

2. Respondent, Phoenix Color Corporation, is an "employer" as defined by Section 5/2-101(B) of the Act and is subject to the provisions of the Act.

3. At the time of the alleged cause of action, Complainant was an "employee" as defined by Section 5/2-101(A) of the Act.

4. The Human Rights Commission has jurisdiction over the parties hereto

and subject matter herein.

5. The Complainant has the burden of proving a *prima facie* case of discrimination by a preponderance of the evidence. Section 5/8A-102(I)(3) of the Act; see, Anderson v. Human Rights Comm'n, 314 Ill. App. 3d 35; and Koulegeorge v. Human Rights Comm'n, Ill. Dept of Human Rights and Tempel Steel Co., 316 Ill. App. 3d 1079, (1st Dist. 2000).

6. The Complainant failed to establish a *prima facie* case of age discrimination.

7. Entry of a directed finding in favor of Respondent was appropriate and should be sustained.

Discussion

Respondent's motion for directed finding:

The Human Rights Commission has the authority to consider motions for directed finding. Koulegeorge v. Human Rights Comm'n, Ill. Dept of Human Rights and Tempel Steel Co., 316 Ill. App. 3d 1079, 250 Ill.Dec. 208 (1st Dist. 2000); Yates and Salvation Army Adult Rehabilitation Center and Lila Delong, ___Ill.HRC Rep. ___ (1988SP0182-3, August 27, 1993); Anderson v. Human Rights Comm'n, 314 Ill.App.3d 35. The Commission has held that motions for directed finding are appropriately considered at the conclusion of Complainant's case in chief. Mott and City of Elgin, __ Ill.HRC Rep. ___ (1986CF3090, June 30, 1992); Burch and Caterpillar Tractor Co., 3 Ill. HRC Rep. 106 (1982); Cockrell and CNA Insurance Co., 1 Ill. HRC Rep. 171 (1981).

At the close of Complainant's case in chief, Respondent moved for a directed finding arguing that Complainant was unable to establish a prima facie case of age discrimination.

In deciding whether the Complainant has made a showing of proof sufficient to survive a motion for directed finding, a two-step analysis must be applied. Happel v. Mecklenburger, 101 Ill. App. 3d 107, 427 N.E.2d 974 (1st Dist. 1981). This analysis requires the trier of fact to determine first, as a matter of law, whether the claimant has presented some evidence, more than a scintilla, on every essential element of his cause of action. If not, the movant is entitled to a directed finding. If some evidence has been presented, then all of the evidence must be weighed, including the evidence favorable to the Respondent. The trier of fact must weigh credibility, draw reasonable inferences and consider the weight and quality of the evidence. If this weighing process results in the negation of some of the evidence necessary to the Complainant's prima facie case, the Respondent is entitled to a judgment in its favor. Kokinis v. Kotrich, 81 Ill.2d 151, 407 N.E. 2d 43, (1980). It is well established that the initial burden of establishing a prima facie case of discrimination rests with the Complainant. McDonnell-Douglas v. Green 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Did Complainant present direct evidence of age discrimination?:

Complainant attempted to show by direct evidence that he was discharged by Respondent because of his age. Complainant made this attempt by testifying that when Mr. Turner informed him in the parking lot that he was being terminated, he asked Mr.

Turner why he was being fired and he replied, "because you are too old and slow." Complainant failed to present any witnesses or evidence whatsoever to support this allegation. Complainant called only one witness -- himself-- and entered no documents into evidence in support of his contention. Complainant's only support for the statement consisted of his uncorroborated testimony. Complainant's testimony was void of any showing of any animus on the part of the decision maker, Andrew Ward, regarding Complainant's age. The direct method of establishing a *prima facie* case of discrimination requires evidence of discriminatory remarks that demonstrate a linkage between the adverse act and the decision-maker's alleged discriminatory animosity. (See, for example, Robin v. Espo Engineering Corp., 200 F.3d 1081, 1089 (7th Cir. 2000).). It is an uncontested fact that the decision to fire Complainant was made by Mr. Ward and not Mr. Turner. Complainant failed to show that Mr. Ward made the alleged statement that Complainant was "too old and slow." Thus, Complainant has failed to prove by direct evidence that Respondent discriminated against him due to his age. Therefore, Complainant must prove discrimination by the indirect method of establishing a *prima facie* case set out in McDonnell-Douglas v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). It is well established that the initial burden of establishing a prima facie case of discrimination rests with the Complainant. Id.

Did Complainant meet his burden of establishing the elements of a *prima facie* case?:

To make out a *prima facie* case of age discrimination under the Illinois Human Rights Act, a Complainant must establish, by a preponderance of the

evidence, that: (1) Complainant is a member of a protected class (age 40 or over); (2) Complainant was doing the job well enough to meet his employer's legitimate expectations; (3) Complainant was discharged or demoted; and (4) similarly-situated younger employees were treated materially better. Koulegeorge v. State of Illinois Human Rights Comm'n, 738 N.E.2d 172 (Ill. App. Ct. 2000), appeal denied, 744 N.E.2d 285 (Ill.), cert. Denied, 122 S. Ct. 195 (2001); Willis v. Illinois Dep't of Human Rights, 718 N.E.2d 240 (Ill. App. Ct. 1999).

It is undisputed in the record that Complainant was 55 years old at the time of the incident at issue, and therefore, a member of the protected class. It is also undisputed in the record that Complainant suffered an adverse employment action when he was discharged from his employment with Respondent on September 15, 1999. In regards to whether Complainant was performing his job consistent with respondent's legitimate expectations, I will assume *arguendo* that he was. The remaining issue then is whether other similarly situated employees were treated more favorably.

Complainant has failed to put forth any evidence whatsoever to establish that there were other employees, who were not is his protected class, that were treated more favorably. On the contrary, the evidence clearly shows the opposite. Complainant's exhibit number 1 shows that everyone who worked for Respondent's facility were treated the same. They were all terminated approximately about the same time Complainant was terminated. Some were terminated before Complainant, while the remaining workforce was eventually

terminated by November 5, 1999, less than two months after Complainant was terminated.[1] Also, the fact is that Complainant failed to introduce any evidence whatsoever of the ages of any employees who worked for Respondent. Therefore, any of the persons who may have been hired after Complainant's termination and who remained until November 5, 1999, could have been as old or older than him.

By failing to offer even a scintilla of evidence that similarly situated employees

were treated more favorably, Complainant failed to establish a prima facie case; therefore, the analysis can be stopped here as the burden would not then shift to the employer to demonstrate a legitimate nondiscriminatory reason for having discharged Complainant.

Complainant had an opportunity to respond to Respondent's motion for directed verdict. Complainant attempted to submit into evidence an affidavit from a purported witness to support his contention that Mr. Turner told him that he was being fired because he was "too old and slow." The affidavit was not allowed into evidence for the obvious reason that affidavits are not considered to be competent evidence and should not be considered by a trier of fact. Matter of Hartman's Estate, 381 N.E.2d 1221 (Ill. App. Ct. 1978).

Upon consideration of all of the testimony and evidence, I find that the Complainant has failed to establish a *prima facie* case of age discrimination, and as such has failed to prove that the Respondent discriminated against him due to his age.

[1] Two employees relocated to Respondent's Maryland, Virginia facility.

Recommendation

As Complainant has failed to make out a *prima facie* case of age discrimination in his case in chief, it was appropriate to grant Respondent's motion for a directed finding. I, therefore, recommend that the directed finding in favor of Respondent be sustained and the instant matter be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____

NELSON EDWARD PEREZ
Administrative Law Judge
Administrative Law Section

ENTERED: March 28, 2003